No. 2365

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLAF LIE, Master of the Norwegian Steamship "Selja", on behalf of himself and the owners, officers and crew of said steamship,

Appellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, Claimant of the American Steamship "Beaver",

Appellee.

REPLY BRIEF FOR APPELLANT.

E. B. MCCLANAHAN,
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Proctors for Appellant.

Filed this.....day of March, 1914.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Appellee's brief in this case naturally divides itself into four main parts: (1) that the "Selja" violated Rule 16 and that such violation contributed to the collision; (2) that the "Selja" also violated the moderate speed rule; (3) that she was further in fault under Rule 29 in failing to reverse her engines; and (4) that she violated Rule 15 in that she was for a long time at a standstill in the water and failed to apprise the

"Beaver" of this fact by blowing two whistles. The first point is handled with great ability and, although we feel that the same is met by the argument in our main brief, we shall endeavor to further answer the points made. The second and third points are obviously untenable and can be disposed of very briefly. In the treatment of the last point an effort is apparently made to discredit the libelant and his witnesses on matters which are largely immaterial.

Before taking up these points, however, we would call attention to counsel's statement on page 2 of the brief, to the effect that the "Beaver's" violation of the moderate speed rule had a good reason behind it, to wit: "*the safety of her passengers*". This is one of the most remarkable contentions we have ever heard made, and we would ask the court to compare it with the statement in *The Columbian:* "Indeed, considering the known frequenting of the locality, her speed was without due regard for human life", and with counsel's statement (on page 78 of his brief) that the "Selja" was "near the entrance of a harbor and in the course of northbound vessels". To say that the safety of passengers is conserved by running at full speed in a fog is to say the impossible. We also note that counsel fails to even refer to the *other* faults which we charge against the "Beaver", and we again submit that the "Beaver's" gross faults, both admitted and proven, clearly account for this collision. All doubts as to the "Selja's" alleged faults should, therefore, be resolved in her favor.

I.

The Alleged Violation by the "Selja" of Rule 16 and Its Contribution to the Collision.

Counsel intimates in his opening statement that the sustaining of Judge Bean's decision on this point will obviate the necessity of examining 1480 odd pages of the four volume record in this case, a suggestion which we think had better have been left unmade, especially when we consider the many citations of testimony on this point alone. We presume that the court will read the record in any event.

Without following in their order the various contentions which are made we will first consider the English cases cited. And let it here be again remarked that *none* of these cases are on their facts inconsistent with the position we take as to contribution to a collision, for, in each case, the vessels were moving ahead when the collision occurred. Even in the case of *The Britannia* this was true. Admitting for the purposes of argument that these cases are against our *construction* of the rule, their facts are such as to distinguish them on the question of *contribution.* Admitting further, however, that this argument is a specious one, the English law as to contribution is, as we have clearly shown, due to a statutory enactment creating a statutory presumption of fault, and *before* that statute was passed there was admittedly no such presumption in England (see our main brief, pp. 74-77). And because of this statute the court in *The Britannia* case said that it was not "free to consider mere contribution to the collision". The reasons why this statutory presumption did not apply in

England, where a vessel's fault could not by any possibility have contributed to the collision, are clearly stated in our main brief (pp. 77-79). Under the statute the courts were prohibited from dealing with the question whether there was *in fact* any contribution, for the presumption was conclusive on this point, but they obviously could not, even under such a statute, hold liable a ship which could not by any possibility have contributed. Justice and reason called a halt at that extremity.

Counsel, with some show of reason, contends that the International Rules are rules for all maritime nations and should be *construed* alike, but this does not mean that, to effectuate this result, the United States should *judicially legislate* into force the special statutory law of Great Britain. It rather means that we should, if possible, apply the law as it existed in Great Britain *before the special statute was enacted,* and that law was the well known maxim: *Causa Proxima Non Remota Spectatur.*

But we may go even further than this. The British Parliament in 1911 enacted the law known as the Maritime Conventions Act, providing not only for a division of loss in proportion to the faults of the colliding vessels, but also expressly *repealing* the law as to statutory presumptions of fault (1 and 2 Geo. 5 C. 57 Subsection 4). On page 10 of a pamphlet on this subject, Messrs. Roscoe & Robertson, editors of the sixth edition of *Marsden on Collisions,* say:

> "The Act repeals the law, hitherto in force, that a ship in the navigation of which one of the Collision Regulations has been infringed, shall be

> deemed to be in fault for a collision, 'unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary'. The effect of the removal of this provision will be that a ship will only be held to be in fault for a breach of the Collision Regulations if, in the opinion of the Court, such breach *did in fact* contribute to the collision, even although the circumstances did not make departure from the regulation in question necessary. It follows that any inquiry as to whether a breach of a regulation *might possibly* have contributed to a collision will be henceforth irrelevant, and the law will now be unquestionably clearer." (Italics those of the author.)

England, therefore, now has no statute on the subject and, therefore, *does not* apply the "but for" or "sine qua non" rule. America also has no such statute and hence the rule should be similar here. Counsel says:

> "Unless rule 16 is mandatory and unless the punishment of the violation is made certain beyond the *casuistries and disputes* as to *proximate* causation, the change from rule 18 * * * is a delusion and a sham."

The learned editors aforesaid say, however:

> "* * * * the law will now be unquestionably clearer".

If our law is to be like that of England and the other great nations, which have adopted the Maritime Conventions Act, the rule of *The Umbria* has only to be still followed on the question of contribution. And the English cases bearing on Article 16 are no longer authority on said question of contribution, but only on the question of *construction.*

Counsel contends, however, that the English statute creating a presumption of fault has been exactly and identically followed by the American courts without the aid of any statute. This is only true, however, to a very limited and very legitimate extent, illustrated by the rule in the case of *The Pennsylvania.* This rule is that when

> "a ship *at the time of a collision* is in actual violation of a statutory rule intended to prevent collision, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster",

and that

> "*In such a case* the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

We have already illustrated in our main brief (p. 121) what is meant by "at the time of collision", showing clearly that we do not refer to a violation "at the moment of impact" (appellee's brief, p. 75, misconstruing our contention), and we again repeat for the sake of clearness. The real point is this: If a vessel violates a rule, and that violation can possibly be said to be not overcome at the time of the collision, then the rule of *The Pennsylvania* applies. If, however, the violation *be overcome* before the collision, the rule does not apply. The underlying object of Article 16 was to bring vessels to a standstill before a collision could occur (see Protocol of Proceedings, pp. 407-509). If that object is not attained, a vessel will be in fault at the time of the collision for her prior violation of the rule in question.

If, however, the object is attained, that violation is not a fault existing at the time of the collision.

Now in *The Pennsylvania* case, the bark Troop was ringing a bell instead of blowing a fog horn, as required by the rules. This was a false signal, as held by the court, and meant that she was not under way, which was not the fact. Moreover, the bell was only heard but a moment or two before the collision, while the vessels were only three or four hundred feet apart (not, as counsel states, "for a considerable period of time"). It was a clear violation of a rule "at the time of the collision" under the above definition. This rule was also applied in *Martello v. Willey,* 153 U. S. 70, cited by counsel in parallel columns with *The Britannia* case. In that case the Martello heard but one blast of the Willey's fog horn (which was not a mechanical one, as required by the rules) before the collision and was, therefore, clearly in fault "at the time of the collision". The case is expressly rested upon that of *The Pennsylvania.* In *Merchants & Miners Co. v. Hopkins,* 108 Fed. 890, also cited, the vessel failed to blow her fog horn at all. In *The Admiral Cecille,* 134 Fed. 673, the vessel at the time of collision was moored in a prohibited anchorage and was thus in fault at the very time in question. It is doubtful, however, whether the rule of *The Pennsylvania* applies in such a case, since there are numerous decisions to the contrary which Judge Hanford failed to notice (see our main brief, pp. 86-87). The remaining cases cited on this point have, we believe, already been sufficiently distinguished (id. 120-121). While there may be and probably is sufficient reason for applying

the "but for" rule to a vessel in fault "at the time of the collision", there is no justifiable reason, apart from statute, for applying it to a vessel in fault six minutes before the collision when that fault has been clearly overcome, as it was in the case at bar.

It seems appropriate at this point and in this connection to take up counsel's discussion of the case of *The Umbria* (166 U. S. 412). It is admitted that Rule 16 was not then in force and that Rule 18 only required a vessel to "stop and reverse if necessary". If it was "necessary" in that case, therefore, for the Iberia to stop or reverse, *she violated a statutory rule in not so doing.* Yet it was clearly held that this violation, even if committed, did not contribute to the collision, the reasons for this conclusion having been fully stated in our main brief. The case of *The Umbria* may not still be authoritative (although there is strong ground for holding that it is) as to *when* a vessel must stop her engines,—in other words it may no longer constitute an authoritative *construction* of Rule 16, but (and this is the vital point) it still constitutes the test as to when the violation of that rule is to be held *contributory to the collision* in a legal sense. And on this latter subject it has been applied over and over again since Rule 16 was adopted, as shown by the cases in our opening brief. Counsel has failed to grasp the two-fold aspect of the decision and, in so failing, has fallen into error in his statements. Moreover, if there be any inconsistency between the case of *The Pennsylvania* and that of *The Umbria,* the latter must clearly prevail, but we submit that there is no such inconsistency because *The Penn-*

sylvania case is limited in its application to the violation of rules at the time of collision.

It is further true that in the case of *The Georgic,* 180 Fed. 863, Judge Hough says that the rule of *The Umbria* as to *when* the duty to stop arises has now been changed by Rule 16. Even if we admit this to be true, however, it simply means that that part of the decision tending to show that the Iberia was *not at fault* for not stopping is no longer applicable, but it does not mean that the entirely separate and distinct rule *as to contribution to the collision* has been changed in any way at all, or that the result of the case would have been different had Rule 16 been in force. And let us here say once and for all as to the case of *The Georgic,* that neither vessel had entirely overcome its headway before the collision and both contributed thereto. As regards its *construction* of Rule 16, the case has already been sufficiently commented upon.

We next propose to take up the cases of *The St. Louis* and *The Admiral Schley,* and, in this connection, to deal briefly with the alleged position of the "Selja" at the time she was sighted by the "Beaver". The language of the concluding part of *The St. Louis* decision to the effect that if the Delaware were reversed and moving backwards it could not be held that her fault was contributory to the collision is admittedly only a dictum (although the unreported decision of the lower court on this subject is by no means a dictum and, as the case was reversed on the facts only, is an authority not only squarely in point, but approved by the higher court), but the dictum of

an appellate court is certainly entitled to most respectful consideration and cannot be brushed aside as lightly as counsel would have it. It is claimed, however, that even if the dictum be accepted as authority, it is not applicable to this case, because the "Beaver" and "Selja" were on *crossing* courses and at the moment of impact the "Selja" was backing at right angles across the "Beaver's" bows. Now it may be that when the vessels struck they were nearly at right angles, caused by the "Selja's" swinging to starboard, first by drifting under her stopped engine, and then through reversing. But to claim that the "Selja" was "backing at right angles across the 'Beaver's' bows", as counsel insists over and over again, as if there was some magic in the phrase, is arrant nonsense even if the statement be literally true. At the risk of lengthening this subject too much, we extract the following evidence from the cross-examination of Mr. James Dickie:

> "Q. Mr. Dickie, if the 'Beaver' struck the 'Selja' at right angles, and the scars on the 'Beaver' were in the condition that has been described to you, would that show that the 'Selja' was crossing the 'Beaver's' bows at right angles astern at the moment of collision?
>
> A. It would show she was going astern beyond question.
>
> Q. It would show that the 'Selja' was crossing the 'Beaver's' bows going astern at that time?
>
> A. She could not be crossing the bows if she was going astern.
>
> Q. If she were at right angles to her, she would be, would she not?
>
> A. Oh, yes, if she was crossing the bows going astern first, yes.
>
> Q. And at right angles to her, if the blow was at right angles?

A. If the blow was at right angles; there is two ways in which you can account for blows; you can account for hitting at the angle which the blow shows, or you can account for its striking at right angles by the 'Selja's' going astern.

Q. That of course would indicate that she was crossing the bows of the 'Beaver' and going astern at the moment of impact?

A. It would be that she was nearly across.

Q. Nearly across. A. Because, hitting the forward end of the 'Selja', that is quite a distance from the stern.

Q. Presuming, according to your statement, she had——

A. (intg.) She had gone astern about 100 feet.

Q. According to your theory. A. According to the calculation, from the testimony, we are correct; so that she would have been nearly in the middle when she started to back, the 'Selja'. The 'Selja' must have been nearly in the middle, that is, if the 'Selja' had laid still, she would have been hit about amidships, a little abaft of amidships.

Q. If she struck at right angles it would indicate that the 'Selja' was going astern? A. Yes.

Q. And crossing the bows of the 'Beaver' at about right angles?

A. At about right angles. Generally you do not talk about a ship crossing the bow by going astern.

Q. Well, but it is a fact?

A. It is a fact that that is crossing the bow.

(II, 453-455.)

The fact is that the "Selja" on her S 65° E course, after stopping her engines at 3:10, drifting ahead and then reversing on seeing the "Beaver" at 3:15, naturally swung to starboard. It is admitted that both these acts were proper, the only claim being that they should have been performed sooner than they were. Yet, because these acts threw her more across the "Beaver's"

course, counsel has the temerity to assert that in backing she was running into instead of away from a collision. Such a claim refutes itself.

But suppose that the vessels were on crossing courses. This was exactly the situation in *The Belgian King* case (125 Fed. at p. 877). And we here paraphrase what the court there said, using the word "Beaver" for "Belgian King" and "Selja" for "Tellus":

> "The rule is that a vessel in a dense fog is bound to observe unusual caution, and to maintain only such a rate of speed as would enable her to come *to a standstill* before she could collide with a vessel which she could see through the fog * * *. That the 'Selja' observed this rule and that the 'Beaver' did not is established by the testimony as to the rate of speed each vesel maintained prior to the collision, and the fact that at the time of the collision the 'Selja' had stopped and the 'Beaver' had not * * *."

The fact that the vessels were on crossing courses *makes absolutely no difference in this case.* The dictum of *The St. Louis* is equally applicable to the case at bar. The "Selja" stopped in time to avoid a collision. The "Beaver" did not.

But the case of *The Belgian King* is fortunately not the only case cited by us where the vessels were on crossing courses. In *The Umbria,* the Iberia and Umbria were on such courses and so were the Commonwealth and the Volund in the case of *The Commonwealth,* 174 Fed. 694, where the court did not, as counsel seems to think, decide that the Volund stopped on hearing the Commonwealth's first whistle, but expressly refused to decide it. If the "Selja" was backing across

the "Beaver's" bows, so also was the Volund doing the same thing in the case cited. The application of the rule as to contribution does not depend on the relative position of the two vessels, but on their ability to come to a standstill before a collision can occur.

The case of *The Admiral Schley* is also strongly relied on in this connection, but, as pointed out in our opening brief, that was a case of a vessel with a tow over 2,000 feet long loitering in the path of navigation and constituting an obstruction thereto. That case, however, cannot be used as an analogy to the case at bar, even if the "Selja" lay across the "Beaver's" course, and this is well illustrated by the case of *The Kentucky,* 148 Fed. 500, where the case of *The Schley* is clearly distinguished. In that case the court said:

> "2. It is true that the Exeter City in being to the northward of a prolongation of the axis of the channel, between it and the northernmost side of the approach, was lying across the track of inward-bound shipping, but whether she was in fault for doing so has been the most strongly contested point in the case."
>
> * * * * * * *
>
> "As a matter of common prudence, I should say that a course to the south side of, or entirely outside, should have been adopted, but did the neglect to observe either of these precautions contribute to the collision so as to render the Exeter City partly in fault? It seems not. This collision happened upon the open ocean. The obstacle which the Exeter City presented to the Kentucky was small, her length of 286 feet and her diagonal position to the Kentucky made it about 200 feet as compared with 2300 feet, the length of the tow in The Admiral Schley, 131 Fed. 433, 65 C. C. A. 417, and Id. (C. C. A.) 142 Fed. 64, relied upon by

the Kentucky here. *Moreover, that case appears to have turned largely upon the condemnation which the courts are apt to visit upon the navigation power of tows of great length when they get into collision through such fault. It does not seem to be applicable here.*''

* * * * * * *

''This collision seems to be entirely attributable to the Kentucky. Her fault of excessive speed in a fog is plain and sufficiently accounts for the disaster. In order to attribute fault to the Exeter City, it would be necessary to resort to an involved state of affairs and consequent uncertainties, which should not be done when a collision can be fully accounted for by a manifest fault on the part of the other vessel.''

In the case of *The Commonwealth,* supra, it was expressly contended that the Volund was lying directly across the course of the Commonwealth. The court there says:

''The next important question is whether the Volund was in fault for adopting the course of south ¼ east, which caused her to expose her broadside to any vessel intending to pass through the channel to the westward.''

* * * * * * *

''Although undoubtedly there was great danger in exposing the broadside of the Volund to any vessel navigating on the usual course through the Race, the master of the Volund was not bound to anticipate that any vessel which he would meet would be transgressing the law as to speed. I find nothing to indicate that if the Commonwealth had been proceeding at that moderate speed which the law demands, the course of the Volund would have interposed any obstacle to the Commonwealth's progress which would not or could not have been avoided by ordinary care and good

seamanship. The Volund was endeavoring to reach the southerly side of the channel from the beginning of her change to the southward and when the Commonwealth came on the scene, the Volund was already somewhat to the south of the center line. The space that she was required to traverse across the channel after making Race Rock was not more than about 2 miles and the time required to cross it was inconsiderable. *If the Volund had been somewhere else this collision would not have occurred but that she happened to be in the dangerous spot when the Commonwealth came along can scarcely I think be deemed negligent on her part.*

"In The Umbria, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053, a case of collision between that steamer and the Iberia in a dense fog off the coast of Long Island, the Iberia was undoubtedly an obstacle to the progress of the Umbria, yet she was not found at fault, the court holding that the Umbria was gravely in fault for excessive speed and solely liable. In The Kentucky (D. C.) 148 Fed. 500, a case in this court not appealed, the other vessel in the collision, the Exeter City, was at the time of collision lying at the mouth of Gedney Channel, across the track of incoming vessels and was collided with by the Kentucky, which was about entering the channel. It was held that the Kentucky was solely in fault for excessive speed. I have not been referred to and am not aware of any authorities which hold a vessel in the Volund's position in fault for being in the Commonwealth's track."

We submit that in this case the mere fact, if true, that the "Selja" lay in the track of the "Beaver" does not put her in fault. The case is entirely different from that of the Schley with her 2000-foot tow. Moreover, as before pointed out, the tug in *The Schley* case had

been unable to come to a standstill before the collision and was, therefore, in fault. We cannot, therefore, regard *The Schley* case as in any way in point, much less as conclusive of this litigation. But even if it were in point, the mere fact that an application for certiorari was refused by the Supreme Court would lend no added weight to it (see *Anderson v. Moyer,* 193 Fed. 499, 505-7).

Counsel says that it is significant that no case can be found where a vessel has been absolved where Rule 16 has been violated and where, "but for" its violation, the collision would not have occurred. We would respectfully refer him to the cases of *The Belgian King, The Commonwealth, Dunton v. Allan S. S. Co.* and the dictum in *The St. Louis.* And we in our turn might remark that it is significant that he has been unable to cite a single case where a vessel moving astern at the time of a collision has been held liable for a prior violation of Rule 16. Moreover, it will not do for counsel to confine the inquiry to violations of Rule 16. Violations of any rules, according to him, bring the "but for" rule into play. Yet we cite in our opening brief numerous cases, both English and American, excusing such violations even though, "but for" the same, the collision would not have occurred (see for instance pp 74-76, 82, 86-87, 89-90). Counsel apparently has not found these important cases even worthy of comment in his very able brief. We submit that the "but for" or "sine qua non" rule (unless expressly made applicable by statute) would be an absolute anomaly in the law of admiralty, except in

a very limited class of cases such as that of *The Pennsylvania.* It cannot properly be applied to cases in general without violating elementary principles of general law. Indeed, as counsel well says, "we need not add that the burden of proof *in all cases of negligence* is on the plaintiff to show not merely the act of negligence, but the fact that such negligence contributed to the disaster; that is, to the collision" (Appellee's brief, p. 53). And we need not further add that this rule is the same even though the negligence be the violation of an express statute.

21 Encyc. Law (2 ed.) 480 and cases there cited;
29 Cyc. 439-440;
V Thompson on Negligence, § 6315;
Bear v. Chicago etc. Ry. Co., 141 Fed. 25, 28.

A particularly applicable case on this point is that of *Berry v. Sugar Notch Borough,* 191 Pa. State 345; 43 Atlantic 240. A motorman was there running his car at a greater speed than allowed by a city ordinance. A tree fell on the car and injured him, and it was contended that his violation of the ordinance showed contributory negligence and barred his recovery. The court said:

> "* * * it was urged on behalf of the appellant that the speed was the immediate cause of the plaintiff's injury, inasmuch as it was the particular speed at which he was running that brought the car to the place of the accident at the moment when the tree blew down. This argument, while we cannot deny its ingenuity, strikes us, to say the least, as being somewhat sophistical. That his speed brought him to the place of the accident at

> the moment of the accident was the merest chance, and a thing which no foresight could have predicted. The same thing might as well have happened to a car running slowly, or it might have been that a high speed alone would have carried him beyond the tree to a place of safety."

This reasoning is cited because it is so similar to that in the case of *The Umbria* and shows the absurdity of the "but for" rule.

In the lower court counsel relied on the case of *Hayes v. Mich. Cent. Co.*, 111 U. S. 228, 241, which we refer to in case counsel should now use the same against us. In that case a railroad company running through a public park (used as a playground for children) failed to put up certain fences to secure persons and property as required by law. A deaf and dumb boy strayed onto the track and was run over. The lower court directed a verdict for the defendant, and the United States Supreme Court reversed the judgment, holding that the case was one for the jury, using certain language which counsel contended was an application of the "but for" rule. Now unquestionably in that case the violation of the statute *proximately* caused the injuries unless the plaintiff was guilty of contributory negligence, and we think it would surprise the Supreme Court to be told that it held, in the teeth of the numerous decided cases, that every violation of a statute brought the "but for" rule into play. In that particular case, *if* the violation of the statute was a cause *sine qua non,* it was a legal cause, but this is not true of most

cases. The court should note in connection with this case the remarks of Judge Taft in regard thereto in *B. & O. R. R. Co. v. Anderson,* 75 Fed. 811, 812-813.

Practically all of the foregoing discussion has been based on the theory that Rule 16 was in fact technically violated. As regards the proper construction to be given that rule, and as to whether it was applicable to this case, we feel that we can well rest on our main brief. We do not feel, however, that counsel has fairly stated our construction of the same in Section VI of his brief (pp. 60-65). Not a word is said by us tending to show that the master is not to blame if he concludes there is no danger, nor to the effect that he need only ascertain the position of the other ship "by an approximation of accuracy". Our position was very simple. We said that all the collision rules were passed with reference to *danger of collision* and, if there was in fact no danger of collision in a particular case, the rules were not applicable and we cited cases to prove this. We also said that, if a master ascertained this fact *and ascertained it correctly,* there was an ascertainment within Rule 16. In this case, up to 3:10 p. m., Captain Lie considered that the vessels were so far apart that there was no danger of collision, and he was correct in that supposition at that time. How our argument could have been twisted into the construction given it by our opponents we are unable to imagine. Counsel says that *the object* to be gained by the rule was "time and space between the ships until navigation should become safe by the knowledge each should get of the position of the other". The

"Selja" allowed six minutes of time and two miles of space, and we contend that that was ample. She could have avoided the collision with ease had the "Beaver" been half as careful in her own movements.

As regards the case of *The Belgian King,* counsel seeks to distinguish it upon the ground that the "Tellus" *had ascertained* the Belgian King's position, which argument is squarely met in our main brief. It is also squarely met by the headnote in the case, placing the decision that the "Tellus" was not at fault squarely on the ground of her *"having come to a stop before the collision"*. The mere fact that the case is not referred to in *Marsden on Collisions* is of no importance, since that work is an English one and comparatively few American cases are cited.

There is little that need be said as to appellee's argument on the major and minor fault principle. Counsel says that the "Beaver" was "on a course apparently clear of ships because no whistles were heard", which is clearly not the fact (see Kidston, III, 855-858, 885-887; Ettershank, II, 539-541). And when he further says that the "Beaver" was unconscious of impending danger, and hence the greater moral fault was with the "Selja", we are astounded. Here was a ship proceeding recklessly at full speed in the fog. Why she did not hear the "Selja's" strong whistle will always be a mystery. Perhaps it was because of her great speed and the noise made by her engines. Perhaps her lookout, who had been drinking, was negligent. Her unconsciousness of impending

danger in no way justifies her reckless speed in a dense fog. Moreover, she unquestionably violated paragraph 2 of Article 16 and other rules besides, as shown in our main brief. The "Selja", on the other hand, proceeded with caution. She was not conscious of danger, but knew there was no danger. And she was possessed of the ability at all times to come to a standstill before any collision could occur. Finally counsel admits that her conduct was not a proximate cause of the collision, but merely a *causa sine qua non.* That the greater fault should lie with the "Selja" under these circumstances is something we cannot fathom.

The foregoing is, we believe, a sufficient answer to all contentions made under Rule 16. We have said little therein as to the testimony quoted by counsel, because we believe it to be of no great materiality. Counsel is, of course, justified in segregating those portions of Captain Lie's evidence which are most favorable to his contentions, and we can only ask the court under the circumstances to read his whole evidence. It was obviously impossible to keep all of the "Selja's" officers here for the trial of this case, but, owing to its importance, Captain Lie was kept here and on him, almost single-handed, fell the burden of meeting the appellee's case. He was put through a most grilling cross-examination and was recalled again and again for more of the same as new ideas occurred to counsel (something which would not have been allowed had the evidence not been taken before

a Commissioner). And, after reading his evidence, we think the court will find that he was an honest man and acquitted himself with credit. Counsel makes much of the captain's mistaking the "Beaver's" whistle for one off the Golden Gate, over twenty miles away, but, as Captain Lie well says, he did not have in mind exactly where the Golden Gate was at that time (I, 220). The mere fact that he had before noted the Fort Point bearings would not necessarily prevent this impression, and counsel seeks, in our opinion, to apply a rather Spartan standard to a Norwegian captain, who had only sailed into San Francisco twice before, one of which times was from the south (I, 148, 149). Counsel also claims that Captain Lie should have consulted with his officers and crew on hearing the "Beaver's" whistle. The evidence, as pointed out in our main brief, is that he did consult his first and third officers who were on the bridge, and both agreed that the whistle was far off (I, 218-219). We think that this was all that was required of him, especially as it later proved that this judgment was correct. However, we see no necessity at this point of going into all the testimony recited by counsel. The vital fact remains that the engines of the "Selja" were stopped six minutes before the collision, while the vessels were still about two miles apart, and at the time of the collision the "Selja" was moving backward. At any time the "Selja" could have come to a standstill before meeting the "Beaver", but nothing she could have done would have prevented the "Beaver" from reaching the point of intersection of

the two courses. Under the rule of *The Umbria* case, therefore, the fault of the "Selja", if fault there was, did not contribute to the collision.

II.

The "Selja's" Alleged Violation of the Moderate Speed Rule.

While we do not admit that the "Selja's" speed of six knots up to 3:05 p. m. was immoderate, we will treat it as such in discussing this contention. Counsel seems to fail to appreciate the difference between a vessel proceeding at six knots up to a point where she cannot avoid a collision after coming in sight of another vessel, and another vessel which, for five minutes before the collision, is drifting under a stopped engine and at the time of the collision is actually backing.

> "* * * if she had been running dead slow for four or five minutes before the collision, she cannot be held in fault for what her previous speed may have been."
>
> *The Ludvig Holberg,* 157 U. S. 60.

> "While it is quite clear from the evidence that the Georgia *had been* violating the rules of navigation as to speed, still this condition did not prevail at the time of the collision."
>
> *Balt. Steam Packet Co. v. Coastwise Tramp Co.,* 139 Fed. 77.

> "The general consensus of opinion in this country is to the effect that a steamer is bound to use

> only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law."
>
> *The Umbria,* supra.

See also

> *The Chattahoochee,* 173 U. S. 540;
>
> *Deslions v. La Compagnie Generale Transatlantique,* 210 U. S. 95, 114;
>
> *Appellant's Opening Brief,* p. 122.

If a vessel is making but two knots, or bare headway, under circumstances which preclude the possibilty of her stopping before colliding after she comes in sight of another vessel, even that speed would be immoderate. Applying the rule to this case, it is apparent that the speed of the "Selja" was moderate, and that counsel should attempt to argue the contrary is but indicative of the weakness of the whole case against the Norwegian vessel. And we again ask counsel to explain *why,* if a violation of the moderate speed rule can be overcome so as to excuse a vessel, a violation of the latter part of the same rule cannot also be overcome.

We submit that in neither the one case nor the other does the prior violation of the rule contribute to the collision.

III.

The Claim That the "Selja" Violated Rule 29 in Not Reversing at or Before 3:10.

We believe that this fault also is clearly covered by our last argument. It must be remembered, however, that at 3:10 the "Selja" was making but 3 knots, not 6; indeed, attempting to hold us to the strict letter of the translated log, appellee says that at 3:10 the "Selja" was "nearly at a standstill". Under either situation we submit that the stopping of the engine was all that the special circumstances called for. At that time the vessels were 1.54 knots, or nearly 1.8 statute miles, apart and the uncontradicted evidence is that if, while making 3 knots, the "Selja's" engine should be reversed she would come to rest in the water after advancing only 220 feet. The fog would permit of Captain Lie seeing the "Beaver" within two ship lengths, or 900 feet. Under these circumstances good seamanship did not require Captain Lie to reverse his engine before coming in sight of the approaching steamer, for he knew that, when that exigency should arise, he could bring his vessel to a stop before reaching the intersection of the two courses. Of course, if he is to be charged with knowledge of the reckless navigation of the "Beaver", then of a certainty he would have avoided the collision by reversing at 3:10, but Captain Lie did not know, nor was he called upon to guess, that the "Beaver" was racing towards him at her full speed,—he did not know that she could not possibly perform her share

of duty when the vessels should come in sight of each other.

Counsel relies strongly on the case of *The Ceto,* L. R. 14 App. Cases 670. In distinguishing *this* and other cases the Supreme Court, in the case of *The Umbria,* says:

> "In the English cases above cited, both vessels were proceeding at a rate of speed no greater than that of the Iberia, and both were held in fault for not stopping and reversing, because, if that had been done promptly, no collision would have occurred; but, if it turn out that the approaching vessel was proceeding at such a rate of speed that a collision could not possibly have been avoided by the other stopping and reversing, it cannot be said to have been a fault with respect to such approaching vessel, that she still continued to keep her engines in motion. In this case it is manifest that no precautions on the part of the Iberia would have been of the slightest avail, in view of the extraordinary speed of the Umbria. It is true that if she had stopped promptly, she might not have reached the point where the courses of the two steamers intersected; but it is equally true that if she had been going at a much greater speed than she was she would have passed the point of intersection before the Umbria reached it. Manifestly this is not the proper test. The propriety of certain maneuvers cannot be determined by the chance that the two vessels may, or may not, reach the point of intersection at the same time, but by the question whether their speed can be stopped before their arrival at the point where their courses intersect."

The duty to reverse, as well as the duty to go at a moderate speed, is fully met where a vessel so maneuvers that she is able to stop before colliding

with an approaching vessel. The "Selja" did her full duty in this respect. *The "Beaver" did not do it.*

We cannot resist referring to a glaring inconsistency in counsel's argument on this subject. He here claims (brief, p. 88) that the preliminary sailing rule of Article 17 as to how to ascertain risk of collision *does not* apply in a fog. In discussing Rule 16, however, he says that "it is but common sense that it (Article 17) would apply *a fortiori* in a fog" (brief, p. 65). This inconsistency is but in line with the inconsistency in claiming violations of both Rules 15 and 16.

IV.

The Alleged Violation by the "Selja" of Article 15.

The first portion of appellee's brief on this point deals with *"the extraordinary story told by the 'Selja's' officers"* (pp. 96-104), and the brief later refers to *"the remarkable series of coincidences"* of libelant's case (pp. 142-147). It would seem appropriate to first take up these vague and general arguments before dealing with any specific contentions.

As stated in our main brief, the evidence of all of the "Selja's" officers was taken on December 2nd, 1910, only ten days after the collision, before appellee's defense had been even outlined, and when all the events were fresh in the minds of the witnesses; whereas, the evidence for the "Beaver" was taken after the lapse of many months. The "Selja's" officers had

no chance to construct any fine spun theories as to the effect of the swell on their vessel, the overrunning or underrunning of her log, the variations of her compass, the soundings shown by charts, etc. Their evidence was as to *the facts* as they believed them to be. They testified, as the record shows, in a straightforward and truthful manner, and we think that the court will believe their evidence as against mere *inferences* sought to be drawn by counsel for appellee from collateral facts. Counsel did not even see fit to cross-examine these witnesses (with a few minor exceptions), and accepted their statements as to effects lost in the collision as absolutely correct. Yet *now* it is said of their evidence: "Would it not tax the strongest credulity to believe it?" and "It is well to consider the extraordinary story told by the 'Selja's' officers." Counsel would have the court believe (for there is no other conclusion from his argument) that the witnesses did not hear the Point Reyes siren *at all,* that the courses of the "Selja" were not as testified to by them, and that the movements of her engines were not as testified to. In plain words, he considers their evidence a tissue of falsehoods.

We do not think that this court will so hold. If the witnesses were making up a case, why, in the name of common sense, did they not make up a better one? If they were perjuring themselves as to sounds, courses and movements of no very great materiality, it would have been very easy for them to have testified that the "Selja" *did* stop on hearing the "Beaver's" first

whistle, and that she blew two whistles before sighting the "Beaver". And they could have done this with impunity under the well established principle of law that their evidence as to the movements of their own vessel would be preferred to that of the "Beaver" as to such movements. *If* they were falsifying they might as well have gone the whole length. *But they were not falsifying.* Their stories are absolutely consistent and bear the impress of truth.

Let us now take up a few of the matters which counsel considers so "extraordinary". The explanation of the "Selja's" two changes of course to the westward is clearly shown by her log, as pointed out on page 5 of our opening brief, and this evidence was clearly competent (*The Kentucky,* 148 Fed. 500). We have also already explained, so far as it needs explanation, Captain Lie's thought that the "Beaver's" whistle was one off Point Bonita (supra, p. 22). Counsel further makes much of Captain Lie's statement that the Point Reyes fog signal had been changed without his knowledge. But what is there remarkable about this? As the captain truly says, a fog signal is often altered (Lie, IV, 1175). Captain Lie knew that the signal he heard was the Point Reyes signal *because it could not have been anything else.* Point Reyes was the very point they were making (Bjorn, I, 110). Almost every officer testifies that it was the Point Reyes signal and its distance away is also at least approximately established. Counsel does not and cannot suggest what other signal it could have been.

We, therefore, again submit that it is absolutely established that the "Selja" heard the Point Reyes whistle at the times testified to, that she was on the courses testified to, and that her engines ran as testified to, and this in accordance with the well known rule that the testimony of witnesses aboard a vessel as to what she did is to be preferred to the testimony of those on another vessel.

We have also examined carefully the statements on pages 142 and 143 of our opponent's brief and fail to find anything singular or remarkable in the facts therein detailed. They only become singular through counsel's *way* of stating them. The times and distances therein mentioned are testified to by the master and officers of the "Selja" as approximate times and distances, not as *exact* times and distances. Lie's plotting on his chart does not, of course, represent the exact situation, but simply the situation as nearly as the witness could figure it out. The method of attack on this evidence is not one which commends itself to us nor do we believe that it will commend itself to the court. If the story of the "Selja's" officers in detailing the courses and movements of their vessel was a tissue of falsehoods (and that it appears so to counsel is plain from his argument), why were they not cross-examined? Counsel then had the two-whistle rule in mind, as shown by his cross-examination of the chief engineer, yet he made no endeavor to break down the "series of coincidences" testified to by these men. We do not believe that the court will discredit

the positive and apparently straightforward evidence of these witnesses on any theory yet adduced in this case. They were presumed to know what happened on board the "Selja" and their testimony cannot be read without believing that they did know and truthfully testified thereto. It will take more than mere alleged discrepancies in soundings or theoretical evidence as to the speed of the "Beaver" to dispute this.

Counsel's argument as to the *soundings* taken on the "Selja" is met on page 30 of our opening brief. Assuming that the soundings shown on the chart are inconsistent with the *exact* course plotted out by Captain Lie, which we do not admit, it is a very minor point in the case. At best it only shows that Captain Lie was a little further from Point Reyes than he thought he was, and proceeding a little faster than he thought, and it in no way affects the evidence as to the *substantial* accuracy of the courses and distances run by the "Selja". Although the testimony of most of the "Selja's" officers is branded as perjured, the evidence of Larsen as to the soundings is accepted as correct. Yet, when we come to examine Libelant's Exhibit Kidston No. 1, we find that the point of collision *as fixed by Captain Kidston* (III, 930) is equally inconsistent with Larsen's soundings for the nearest sounding inside is 31¾ fathoms and outside 32¼ fathoms. If the soundings contradict Captain Lie's evidence they equally contradict Captain Kidston's. It is possible that Larsen, testifying from memory, may have made a mistake.

Counsel says that the identity of soundings "from *2:45* to the time of the collision" is "persuasive evidence that the vessel had been at a standstill for some time before the collision". In other words, the claim is now made that the "Selja" came to a standstill at about 2:45, *half an hour before the collision.* Not only does this claim destroy the last possibility of reliance on any violation of Rule 16, but it presents a situation which is absolutely ridiculous on the face of the testimony. Such a situation *cannot be conceived.* Not only this, but it is contradictory of appellee's sworn pleadings, which admit that *after 3 p. m.* "the 'Selja' continued on her course without stopping her engines for many minutes at *a high rate of speed* in said fog, to wit, *more than 6 knots per hour"* (I, 24-25). This very fact is made the ground for one of appellee's charges of fault against the "Selja", and we do not think the court will allow this solemn admission to be disregarded at this late date.

It may be that, judging from the chart alone, the soundings testified to by the second officer do not coincide with the line A. B. or even the line I. F. D. E. on appellee's drawing on page 145 of its brief, but to say that this discredits the whole of libelant's case is going, we believe, further than this court will care to go.

See in this connection:

The Newport, 36 Fed. 910.

Captain Lie repeatedly testified in this case that the soundings reported to him were 29 and not 35 (see, for

instance, pp. 1187, 1201). He also said that he built his chart on what he experienced on the bridge and not on soundings or anything said after coming ashore (Lie, IV, 1187). That there may have been a mistake as to the soundings is possible. That Captain Lie's diagram may be incorrect in certain particulars is also possible. But it is *not* possible, we submit, to disregard the evidence of Captain Lie and his officers as to the movements on their own vessel and to say, as counsel does, that Captain Lie did not know where he was within twenty miles and was waiting at a standstill for the fog to lift. To do so is to brand libelant's evidence as out and out perjury. No more lenient explanation is possible.

As pointed out in our main brief, the basic fact in this case is that the "Selja" heard the Point Reyes siren at 2:30 p. m. while on a course of S 60° E. If this fact be accepted, appellee's theories fall to the ground.

There is much more that might be said in answering that part of appellee's brief which is now in question. We do not feel, however, that anything could be gained by saying more. The whole question depends for its determination on whether the court will reject the testimony of reputable men on the "Selja", whom counsel did not see fit to cross-examine and whose statements as to personal effects lost in the collision he took as absolutely correct.

Having discussed certain generalities in appellee's argument (we have not even pretended to discuss

them all), we now turn to the contentions made under sections "a", "b" and "c" of the brief (pp. 104-141).

A. ADMISSIONS, ETC., AS TO "SELJA" BEING AT A STANDSTILL.

This subject is quite fully treated in our opening brief (pp. 44-50), but will be discussed further in view of appellee's argument. Counsel claims that, if the log says that the "Selja" was *nearly* at a standstill at 3:10, she must have been *actually* at a standstill at 3:15, entirely overlooking the fact that the log also sets forth the vessel's prior speed and hence shows that she could only be nearly at a standstill so far as her prior speed permitted her to be.

The evidence of Inspector Bulger, already fully commented on, is next set out in full and it is said that, while he noticed the discrepancy in Lie's statements at once, he wanted to wait and check it up by the chief engineer. In view of this remarkable statement it is worth while to set out what the testimony before Bulger *was:*

> "Q. If you were stopped 5 minutes why didn't you blow two whistles?
>
> A. Because she was going ahead yet.
>
> * * * * * * *
>
> Q. When the engines are stopped does the law say you shall blow two whistles? A. No.
>
> Q. Your vessel is practically stopped at that time?
>
> A. No, as soon as my vessel has headway, I cannot blow 3 (2) whistles.
>
> Q. Your engines were stopped 5 minutes and you still had headway? A. Yes, sir.

Q. How fast were you going through the water?

A. 3 or 4 knots. She would not slow herself in 5 minutes. She will only swing around—a tramp like that.

* * * * * * *

Q. As soon as she backed her stern would go to port. Was she on the point of stopping?

A. As I said before, when I blowed 3 whistles I was then at the point of blowing two whistles to show that I stopped, then the steamer loomed up and she blowed 3 whistles at the same moment, then I backed engines and blowed 3 whistles.

* * * * * * *

Q. When you blow two whistles your ship is stopped through the water?

A. Yes, sir. That means the ship is done in the water.

* * * * * * *

Q. When you stop your engines dead still you are virtually stopped?

A. We are not allowed to blow as soon as we stop our engines. We may be going 15 or 20 knots."

(Bulger, III, 963-967.)

After reading this testimony to Bulger the following took place:

"Q. Now, do you remember just at that point, that Inspector Bolles turned to you and said, 'When she is stopped through the water, when there is no way on her': do you remember that?

A. Yes.

Q. Do you remember, Captain, that you were a little confused as to the meaning of the rule?

A. It looked that way, yes.

Q. It looked that way, and Bolles was setting you right in the matter?

A. Yes. I have a right to continue now, haven't I?

Q. Yes, I am not going to stop you. Now, do you see any evidence at all in that record of a

present recollection on your part—present at that time—of this statement that Captain Lie had made to you a few minutes before?

A. Just exactly the point where I had it too. I knew that if I could get the engineer's log and verify the 10 minutes I didn't want to go any further. I called for the log of the engineer and wanted to put the engineer on the stand at that time for the simple reason to find out *how long those engines had been stopped,* and taking the difference of time between that and the collision and finding out whether the statement he had previously made to me was correct or not. That was my object."

(Bulger, III, 967.)

"Q. I am asking you about how long it would take the ship to stop her headway; would the engineer know that?

A. The master of the ship would know it. He said he was looking over the rail and was waiting, with the mate's hand on the whistle, to see her headway stop in the water before he could blow the two whistles.

Q. How were you going to get from the engineer's log any data which would enable you to contradict or confirm Captain Lie's statement about the 'Selja' having been stopped in her headway for 10 minutes?

A. When the captain got on the stand he said her headway was nearly off after 5 minutes. I wanted to get *the bells* from the engineer to find out what time—we had the time from the captain—to find out *at what time the bells were rung to the engine room and then take the difference between the time and see whether that was correct or not".* (Id. 970.)

We submit that it is clear from this evidence that all Captain Bulger wanted the chief engineer for was to find out *when the engines were stopped* and not to find

out how fast the ship was going. Counsel's elaborately worked out theory as to the reason why we refused to allow the chief engineer to be called not only has no basis in fact, as shown by the foregoing, but is absolutely immaterial. Permitting these foreign witnesses to be examined before the inspectors was a mere question of courtesy, and no inference unfavorable to libelant can be drawn from his failure to produce them. This brings us, however, to one of the most remarkable features of this case.

On Captain Bulger's examination the witness expressly asked counsel for libelant whether any discourtesy had been shown to Captain Lie, and counsel gave him a very frank answer (III, 977). This answer, although of course not evidence in the case, was used by appellee as a pretext for calling *opposing counsel* as a *witness* in the case *to explain this and other statements made by him* (III, 981-1005). This entire examination was immaterial and irrelevant and we do not think the court should give it its approval. So far as we know it is wholly without precedent and was, in our opinion, highly discourteous. And there is not one word of evidence to show that counsel for libelant had any idea that Eggen would testify that his vessel would stop in three minutes. We will drop this distasteful subject right here.

We have already explained Eggen's testimony in this case (opening brief, p. 48). Counsel says that he testified the same way before the Norwegian Consul, but his evidence there was confined to a time "just preceding the accident" (IV, 1342). We have already also taken

up the alleged conversations on the bridge of the "Beaver". We disclaim any intention of charging falsehood to these witnesses or to Captain Bulger, but what we do say is that they must have misunderstood Captain Lie and that what he actually said, or at least meant to say, was that he stopped *his engines* at *ten minutes after three.* As he himself well says, "You must remember that I am not as good to explain myself in the English language as I ought to be" (IV, 1208).

In our main brief we did not take up the alleged admissions by Lie and Eggen to Mr. Frey on December 1st, 1910, which are now relied on by appellee. The only point of any value as regards Lie's admission is that he said he stopped his engines "about five minutes after hearing the 'Beaver's' *whistles*". This is contradicted by the testimony of all of the "Selja's" officers, by Eggen's alleged admission at the same time, and is so vague and general as to be utterly worthless. As to the memorandum of the conversation with Eggen, we do not believe that the methods employed to secure the same and of its later use will commend themselves to the court. The very day after the alleged statement was made Mr. Frey attended the taking of the depositions of the "Selja's" officers with his counsel, but said nothing as to Eggen's prior statement. His reason for this was as follows:

> "A. Well, as matter of fact, to be perfectly frank about the matter, I certainly considered that the testimony given under oath would have more weight than a statement made in an informal way

in my office. At that time I did not consider that these statements were any more than office memorandum."

(Frey, II, 716.)

Under these circumstances, after the chief engineer had returned to Norway and on July 18th of the following year, appellee produced Frey's typewritten statement as to what Eggen said, and libelant was deprived of its right to contradict it. It was the duty of appellee to have confronted Eggen with his statement on December 2nd, and we believe that this court will so hold.

We do not feel that this court will pay much attention to the various alleged admissions, since the law is that they are entitled to almost no weight (opening brief, pp. 46-47). Indeed it is doubtful whether, as against the owner of the "Selja", they can be used at all (*Packet Co. v. Clough,* 20 Wall. 528), except for the purpose of attacking Captain Lie's veracity. We do not believe that Captain Lie made the admissions, and we have absolutely proved that, if made, they were untrue.

Counsel, however, lays great stress on the fact that none of the officers of the "Selja" were asked by us whether she had lost her headway before she began to reverse, also saying that this was a glaring fault of which it had been intimated by Mr. Bulger that she had been guilty. We have already recited the testimony taken before Inspector Bulger, on this point, and his only intimation of fault, if there was any intimation, was based on the *mistaken* belief that the two whistle rule applied to a stoppage of the engines and

not the ship (III, 967). And, as we have also already pointed out, the depositions of the "Selja's" officers were taken before appellee's defense was even outlined and they then returned to Norway. Had we foreseen that this defense would be made, the officers would, of course, have been called on to testify. Counsel's inference is that they were not called on because their testimony would have been unfavorable, but *why* any such inference? If, as he claims, it would "tax the strongest credulity" to believe the story they did tell, the rest would have been easy. If they could perjure themselves as to facts which were not vital, they would certainly do the same as to facts which were vital. Here again we do not think that the court will follow counsel in his inferences.

Fortunately for us, however, counsel himself has put in the record express corroboration of Captain Lie on this point by Third Officer Bjorn, and he expressly pinned counsel for libelant down to an admission that Bjorn so testified and necessarily thereby offered Bjorn's evidence on this point as a part of his case:

> "Captain said he is going a little ahead because there was a heavy swell from astern."
>
> (IV, 1211-1212.)

The testimony is more fully stated in Captain Kidston's evidence (which surely may be used to explain the foregoing extract put in by appellee):

> "Q. Was your vessel stopped before the collision?
>
> A. Yes, sir, it was dead slow. Asked captain if I should give two whistles, but captain said he was

going a little ahead because there was heavy swell from astern.

Q. She was forging through the water?

A. She was moving a little ahead. I asked captain if I should blow two whistles, he said no, as she had way on."

(III, 845-846.)

All this took place, as shown by the context, when the "Beaver" was first sighted and just before the "Selja" blew three whistles, showing that she was reversing (see also Bulger, III, 972-973). This evidence clearly corroborates Captain Lie's evidence to the effect that he still had way on when the "Beaver" was first sighted, and in any event shows that he so expressed himself to the third officer at the time. And we once more point out that, if there is a *doubt* as to whether Rule 15 was applicable, that doubt must be resolved in favor of the "Selja".

We have referred in our opening brief to the evidence of the distinguished construction engineers and architects as to how long it would take the "Selja" to stop, and through them we have demonstrated that the proposition is one that can be worked out mathematically. Mr. James Dickie, on whose testimony we especially rely, is a man of international reputation, and his evidence on this point is based on a very vast experience—an experience greater in fact than that of any man on the Pacific Coast (III, 1063). This witness, like Captain Lie, was recalled many times for further cross-examination, and we earnestly ask the court to read the whole of his testimony bearing on this point very carefully. There is much of it that might be cited with telling

effect, but it can be better appreciated when read as a whole, and this brief is already too long. Counsel says that these experts disagree with Captain Lie as to when the "Selja" was stopped by about four minutes, because Captain Lie thought that she was just about stopped at the time the "Beaver" hove in sight. He admits, however, that he could not say exactly at what time she would absolutely be done in the water, and simply thought that she would be sufficiently done to allow him to blow two whistles (I, 262; IV, 1164). If, however, she was still going ahead, no matter how little, her captain would be justified in not blowing two whistles. Captain Lie's thought that she was almost done in no way conflicts with the evidence of the experts that in fact she would not be done.

It is all very well to say that our evidence on this point is "based on formulae made up from the launching pool", but the fact remains that no witness was called to contradict the expert testimony on this point, *nor could it be contradicted.* Counsel also intimates that these "formulae" are deceptive when applied to loaded vessels, but the experts took this fact carefully into consideration. As a matter of fact, the "Selja", on the voyage in question, was *very light.* Counsel himself took pains to bring this out (Larsen, I, 89), as well as the fact that it took a much longer time to stop a vessel which was light (Eggen, I, 76), presumably for the purpose of showing that the "Selja" would have her speed materially added to by the following swell.

After all, however, much must be left to a master's judgment in determining whether his vessel has any way

on her, and he should be most careful not to blow two whistles too soon under Rule 15. Even if it be true, therefore, that the "Selja" did stop in three minutes, it was a matter of much nicety of judgment to decide *just when* she was dead in the water. She was probably making a litle over three knots at 3:10 (having dropped from a six knot speed) and could not stop at once, and any mistake would at most have been a mistake of but one or two minutes before the "Beaver" came in sight and the "Selja" reversed. Captain Lie thought that his vessel was still moving a little (and so told his third officer), and surely the court will allow that much to his judgment, since the matter is entirely one of judgment (see *The Lord O'Neil,* 66 Fed. 77).

We submit, in concluding this subject, that Captain Lie's alleged admissions as to a stoppage for ten minutes are inconsistent with the absolutely proved fact that the "Selja's" engines were not stopped till 3:10 P. M., and are also inconsistent with appellee's sworn pleadings. They, therefore, cannot be accepted, even if they were made, and with said admissions put aside the evidence is absolutely overwhelming to the effect that the "Selja" was not at a standstill at any time before sighting the "Beaver".

B. CONTENTION THAT THE "SELJA", WHEN FIRST SIGHTED BY THE "BEAVER", WAS LYING IN THE TROUGH OF THE SEA AT RIGHT ANGLES TO THE "BEAVER'S" COURSE.

Even if the above contention be established, we utterly fail to see how it has the slightest tendency to prove that the "Selja" had come to a standstill, for which

reason we consider the question of little importance. We will eliminate in the beginning the first four pages as to the swell, as coming more appropriately under the next heading. We admit that there was a westerly swell, the only dispute being as to how heavy it was, and this latter point in turn only affecting the "Beaver's" rate of speed, so we fail to see its pertinency in this connection.

We will also not go into the numerous citations of evidence made by counsel for appellee as to the *angle* at which the vessels approached each other.

In the first place, when the two vessels sighted each other, both were *in extremis*. And no great dependence can be placed on the evidence of either side as to the exact location of the other vessel. The "Selja", *as testified by all her officers,* was on her S. 65° E. course, but she had undoubtedly fallen off this course to some extent on stopping her engine. Although not dead in the water she obviously did not have steerage way for very long. Then, too, the "Selja" reversed her engine immediately upon the "Beaver's" coming in sight. This naturally tended to swing her to starboard (Bjorn, I, 118; Lie, I, 177) and further off her course. It is said by the appellee that the "Beaver" was also swinging to starboard. As to this, however, there is much doubt. In his report to the Inspectors Captain Kidston said that, after putting his helm to starboard, the "Beaver" swung a half point to port, that her engine was then put full speed astern, and that then her helm was put hard-a-port (IV, 1480). All these maneuvers took place within a minute or a minute and a half of the collision.

The claimant's answer alleged that, as a result of these maneuvers, the "Beaver" was swinging rapidly to starboard. Acting on this report of Captain Kidston's, which was certainly supposed to state the case as favorably as possible for the "Beaver", libelant asked his experts whether the "Beaver" would in fact be swinging rapidly to starboard under the conditions detailed in the report, and they answered no (II, 362-3, 431). Not only this, but counsel for the "Beaver" brought out on cross-examination that she would not only not be swinging "rapidly to starboard", but would be swinging to *port* (III, 1086; IV, 1222). Counsel says that he then offered to have an experiment made with the "Beaver", and that the experts then discovered that they had left out one element in the equation and that the "Beaver" *would* be swinging to starboard. It will be noted from the record, however, that we offered to co-operate with the claimant in making the experiment *along the lines of the questions that were put to the experts* (IV, 1306). Captain Kidston, however, did not testify at the trial in accordance with his report, but did testify that the hard-a-port order was given *before* the engine was reversed and, *under these changed conditions,* the experts said that the "Beaver" would be swinging to starboard (IV, 1363). The court can take its choice whether to believe the report of Captain Kidston made a few days after the collision or his changed testimony given many months later. We would also point out in this connection that Captain Kidston's *report* is borne out by Quartermaster Hanson, who says that the "Beaver" blew her three whistles (showing that she had her engines reversed)

before *he got* the order of *hard-a-port* (Hanson, II, 595). And the fact is that those whistles were not blown till the vessels came in sight of each other, as Captain Lie *saw* the "Beaver" blowing them. As the proposed experiment *based on this fact* was abandoned, we can only take it as a confession that under those circumstances she would not be swinging rapidly to starboard and very likely would not be swinging to starboard at all. If this be true, an approach at right angles would not show such a large falling off from the "Selja's" course of S. 65° E.

We do not think, moreover, that the testimony of the "Selja's" officers that the approach was at "about right angles" is very potent to prove anything in this case, as it is difficult to tell just what *time* this evidence relates to, and time is of the essence in this matter. As to the "Beaver's" testimony on this point, it is all suspiciously alike, each witness using exactly the same words ("in the trough of the sea") to describe the "Selja's" position. Here again also the *times* are not specified with accuracy. Chief Engineer Paul, for instance, says that he saw the "Selja" only "a couple of seconds" before the collision and that she was *then* lying in the "trough of the sea" (Paul, II, 603). But it is obvious that, with the "Selja" swinging to starboard under her reversed engines at that time, if she was in the trough of the sea two seconds before the collision, *she could not have been there* when the vessels first sighted each other. And Ettershank, who also gave testimony as to the "Selja" lying in the trough of the sea, says that he only saw the "Selja" *half a*

minute before the "collision" (II, 507). Furthermore, Paul says (II, 602) that at the time of the collision the "Beaver" was "heading right up to the swell". If this be true, and it also be true that she was swinging rapidly to starboard, she could not have been heading this way when she sighted the "Selja".

There is another potent fact which makes strongly against the "Beaver's" contention on this subject, and that is the position from which the "Selja's first whistle was heard at about 3:13½ P. M. On this point Captain Kidston testifies as follows:

> "Well, then, I made up my mind that I might have been wrong; and when I heard the second whistle it sounded to me very close aboard. The officer who said he heard the first whistle said it was about *a point on the starboard bow* and I had swung about *a half point,* and that whistle seemed to me—I did not go to the compass—but it seemed to me to be *still about a point on the bow,* that she might be crossing our bow and there was only one thing for me to do, to stop and go astern and I put my helm a-starboard and tried to swing under her stern" (Kidston, III, 898).

If the first whistle was heard on the starboard bow at 3:13½, and the second whistle was heard at 3:14½ in the same place, although the "Beaver" had swung *half a point to port,* the only conclusion possible is that the "Selja" was still going ahead during this interval and could not have been at a standstill. Upon the whole, in view of these facts, we believe that Captain Lie's evidence as to the angle of approach is probably correct:

> "A. That angle increased; that angle was increasing steadily, as my vessel swung, and I saw the 'Beaver's' sides. I was watching the 'Beaver'

carefully then and I thought probably she would pass wide of me; her starboard side was broadening all the time as I was watching her."

(Lie, I, 175.)

We also believe that the amount of both the "Selja's" and the "Beaver's" swinging to starboard has been greatly exaggerated by counsel, although we frankly admit that the "Selja" probably swung a good deal more than Captain Lie thought she did (note his testimony before Bulger, "She would not slow herself in 5 minutes. She will only swing around—a tramp like that". III, 965). The great truth remains that the "Beaver" penetrated the "Selja" for 18 feet on her port side and only 10 feet on her starboard side (Stewart, I, 138-139). Counsel's explanations of this are weak and inconclusive. We submit that it is a physical fact which cannot be escaped from and shows that the impact was not directly at right angles, and that the "Selja" was moving away from the intersection of the two courses.

But however all this may be, it still remains true that the evidence has no real tendency to show that the "Selja" was at a standstill for some minutes before the collision. Taking the view most favorable to the appellee, it can be fully explained by the fact that the swinging of the "Selja" was due to her having first lost her steerage way and then reversed her engines. We do not believe that all this complicated mass of theory and conjecture will cause the court to disbelieve the positive evidence of the "Selja's" officers that she was proceeding on a course of S. 65° E. and did not stop her engines until 3:10 P. M.

The contentions which we have just treated well illustrate the rule laid down in the case of *The Kentucky,* 148 Fed. 500, 504. There the Kentucky was at fault for excessive speed. A complicated theory was, however, presented to show that the other vessel was also in fault. The court said:

> "This collision seems to be entirely attributable to the Kentucky. Her fault of excessive speed in a fog is plain and sufficiently accounts for the disaster. In order to attribute fault to the Exeter City, *it would be necessary to resort to an involved state of affairs and consequent uncertainties, which should not be done when a collision can be fully accounted for by a manifest fault on the part of the other vessel.*"

We submit that the same rule should be applied to the case at bar.

C. CONTENTION THAT THE COLLISION TOOK PLACE ABOUT SIX MILES FROM POINT REYES AND NOT WHERE CAPTAIN LIE TESTIFIED.

Considerable is said on this subject in our opening brief (pp. 22-30), but counsel's discussion of the same (appellee's brief, pp. 123-127, 136-141, 148-154) calls for some further reply. Said discussion deals mainly with the alleged distance traversed by the "Beaver". As before pointed out, we have an *admitted* rate of speed up to the Red Buoy, which, if continued, would bring the "Beaver" up to the point of collision as testified to by Captain Lie. We then have what our opponent would call a "remarkable coincidence", namely: a swell so great as to retard the "Beaver's" speed three knots an hour and cause her log to overrun. The swell, ac-

cording to counsel, was "comparable with the worst storms in midwinter", yet Captain Kidston says that he has made "as low as five knots in a heavier swell" (III, 864).

It was, of course, necessary at the trial to show some retardation of the "Beaver's" speed, if she was going at a fifteen knot rate, and this was accomplished by the evidence as to the swell. We do not say positively that there was not a heavy swell on that day, although we believe that appellee has made too much of it. Counsel says that there is no contradiction to the testimony that the "Beaver's" speed was cut down to 12 knots (brief, p. 150). The testimony of the experts that it could not be cut down that much by a swell without wind seems not to be considered. It is well, however, to consider the contradictory statements of the "Beaver's" witnesses in determining what credit is to be given them, and we will adopt counsel's effective method (brief, pp. 152-153) of enumerating a few of these inconsistencies:

1. *Speed of the "Beaver" at 77 Revolutions in Smooth Water.*

Taking what we were told by appellee (IV, 1469) was the speed of the "Beaver" on her trial trip with 86 revolutions (17.6 knots), the experts testified that her speed at 77 revolutions would be *15.76* knots (D. W. Dickie, II, 363; Heynemann, II, 391; James Dickie, II, 433). Chief Engineer Paul, who was on board at the time, testified that 17.6 knots was in fact her speed on

her trial trip (II, 614). Later Mr. Frey informed us that this was an error and should be 17.06 (II, 719) and, on this changed assumption, Mr. D. W. Dickie said that her speed at 77 revolutions would be 15.27 knots (IV, 1220). It is, therefore, open to doubt whether the rate of *exactly* 15 knots at *exactly* 77 revolutions ("Always it will be noted the significantly chosen numbers" and "Was there ever such perfection of calculation", appellee's brief, p. 43), so glibly testified to by some of the "Beaver's" witnesses, is correct. It looks as if she was capable of *greater* speed.

2. The "Beaver's" Speed up to Duxbury and When She Passed Duxbury.

Kidston says the "Beaver" passed within half a mile of Duxbury, and counsel adds that she was proceeding on "known courses". Ettershank says that generally the "Beaver" passes Duxbury "about a mile off" (II, 544). Kidston says that the "Beaver's" speed was reduced by the swell between Red Buoy and Duxbury. Ettershank says that she was *still* making "around 15 knots" (id. 531). He also says that at 2:15 the "Beaver" might have been a little *past* Duxbury (id. 532). In other words, the "Beaver" may have been going faster up to 2:15 P. M. than Kidston thought she was.

3. The "Beaver's" Speed in General as Testified to by Her Own Witnesses.

a. The claimant's sworn answer to Interrogatory No. 5 in the freight suit alleges that the "Beaver's" speed

at 3 P. M. under 77 revolutions of her engines was *11 knots.*

b. Captain Kidston, at the hearing before the inspectors, said that her speed was *11 knots* (Kidston, 877).

c. At the same hearing Kidston testified that her full speed was *17 knots* (id).

d. Chief Engineer Paul, at the same hearing, said that her full speed was *16 knots* (Paul, 639), and that on the day of the collision she was slowed to *13 knots* and was not making more *at any time* on that day (id.).

e. On the trial Kidston testified to a speed of 15 knots cut down to 12 on leaving the Red Buoy.

f. On the trial Chief Engineer Paul testified to the same state of facts as Captain Kidston, but also said that *full speed was 77 revolutions* (Paul, 618).

g. Second Officer Ettershank said on the trial that the "Beaver" was making around 13 knots at the time she reversed her engines, *which was a reduction of her previous speed* (Ettershank, 520-521).

In view of these contradictory statements, some of which led us to so frame our questions to the experts that counsel now says such questions are immaterial, how can *any reliance whatever* be placed on the deductions made as to the "Beaver's" speed.

4. The Run of 19.6 Knots Claimed to be Shown by the "Beaver's" Log.

We have already suggested that the testimony as to the setting of the "Beaver's" log at 1:45 P. M. is most

unsatisfactory, because the man who set it was not called as a witness. It is now said that Ettershank's evidence shows that it was set. This witness, however, was on the bridge from the time the steamer was under way until the collision (II, 503), so he could not have seen the log set any more than Captain Kidston could have and it is obvious that he did not see it. We know that it is said to have been *ordered* set at 1:45, but we also know that there were delays in carrying out other orders. Moreover, the log must have overrun 1.6 knots to fix the point of collision where Captain Kidston fixes it. Lopez thinks this would be "the extreme limit" that it could overrun (III, 773). And Ettershank says the log would only overrun on that day half or three-eighths of a mile an hour (II, 514), and that the "Beaver's" run would be about 19 knots and not 18 (II, 533). Quot homines; tot sententiae! It would have been very interesting to have learned how much of a run the log showed on the "Beaver's" return trip to San Francisco, but unfortunately this was never recorded and the explanation of this is far from satisfactory (III, 917-918).

5. The Extraordinary Swell.

This swell was "a heavy westerly swell" on the "Beaver's" main case (and maybe this is true). It did not, however, become an extraordinary swell "comparable to the worst storms in midwinter" till the pilots took the stand in rebuttal. Pilot Swanson says in the passage from his evidence quoted by counsel that at about 1 P. M. there was "an extraordinary heavy break

on the bar". Third Officer Judson of the "Beaver", going out at about the same time, says: "Well, the bar was breaking *slightly* when we went out" (II, 478). Swanson further says:

> "Q. How high did the water come over you?
> A. Well, I thought it was 500 feet. I was with my hands up this way, and it filled up and came up to my shoes on top of the bridge. I was in the middle of the ship."
>
> (IV, 1287.)

Note also the evidence of Pilot McCulloch:

> "When I entered the North Channel everything there was smooth in the channel, but the west bank was breaking tremendously. It was breaking so that from the inside west bank buoy to North Head was one continuous run of white water, and, gentlemen, I tell you that when those Japanese officers saw that white water ahead of them, and not knowing where I was directing their ship, the ten officers in that turret fixed their eyes on me to see whether I was going to quiver in taking that ship through or no. There was a continuous line of white water from the west bank to the North Head, without a break at all, and I, knowing that there was sufficient water there, took their ship through."
>
> (IV, 1292-1293.)

When we contrast this grossly exaggerated evidence with the testimony of the "Beaver's" officers, who certainly went as far as they could, we do not think that it should be taken quite literally.

Captain Kidston says that the swell was a *long smooth one* (III, 870). Chief Engineer Paul, however, says that it was "a heavy sea" as distinguished from a swell (II, 608, 613), and that there were whitecaps and "good long

caps at that'' (II, 613). Broaddus, the wireless operator, when asked if there was much sea on, says: ''There could not have been much sea on—there was no wind'' (IV, 1112).

That the maregraph referred to by counsel showed unusual disturbances at that particular period is undoubted, but how far these disturbances affected the ''Beaver's'' run can only be guessed at in view of the unreliable and inconsistent testimony given on her behalf.

When we contrast all of the foregoing evidence with that of Captain Lie and the ''Selja's'' officers, we submit that the story of the latter does not suffer from the comparison, and that it is more reliable as regards the point of collision. It is true that Captain Lie could not take exact bearings of Point Reyes, as Captain Kidston claims to have done, but the reliability of these latter bearings, taken after the excitement of a fearful collision, with the fog lifting and shutting down, may be seriously questioned.

Counsel also refers to certain evidence of the expert, James Dickie, to the effect that the ''Beaver's'' speed might have been retarded seven-eighths of a knot. It will be noted, however, that the witness considered this a very liberal allowance and that the speed would probably be retarded less. The witness' views as to the effect of a swell without wind are most interestingly stated on pages 1049 to 1060 of one of his many cross-examinations. We also quote the following testimony as fully explaining his attitude:

"Q. In Mr. Denman's examination of you, you said that a large swell would affect the speed of a ship; you were not further cross-examined on that particular statement. What do you mean by that? To what extent would that affect the speed of a ship?

A. If you give me the height of the swell I think I could answer it pretty closely on the 'Beaver' case.

Q. Let us get down to something practical. You know the North Channel here?

A. Yes.

Q. You have passed through it?

A. Yes.

Q. Do you know what is called the Potato Patch?

A. Yes.

Q. Let us assume that the 'Beaver' is passing through the North Channel at a speed of 15 knots per hour that there is a swell breaking over the Potato Patch westerly, and she directs her course after she leaves the North Channel into this swell in a westerly direction; to what extent would that, in your opinion, affect the 15-knot speed of the 'Beaver'?

A. I don't know because one thing has no connection with the other whatever. How much water is on the Potato Patch?

Captain KIDSTON. 4 fathoms.

The WITNESS. That is 24 feet.

Mr. DENMAN. And let me add this suggestion, it is breaking 4 breakers on the Potato Patch before it gets across into the North Channel.

A. That would not be a very big sea when it would break. I think about a 7-foot sea would break on the Potato Patch—6½ feet or 7 feet. I am talking of the sea in the North Channel. I think about 6 or 7 feet would break on the Potato Patch.

Mr. MCCLANAHAN. Q. I am simply stating to you that it is breaking on the Potato Patch in order to give you some idea of the swell. A. I am try-

ing to get the height of the sea. I could figure it out but I could not figure it sitting here.

Q. Would such a swell affect the speed of the 'Beaver' after she left the North Channel to the extent of retarding her speed 3 knots per hour?

A. No.

Q. You said there were certain sea conditions that would affect the speed of the 'Beaver'?

A. Yes.

Q. What are those sea conditions?

A. A gale of wind, a heavy sea.

Q. By a heavy sea do you mean one accompanied with wind?

A. One accompanied with wind.

Q. Would a smooth swell affect the speed of the 'Beaver' materially? A. Slightly, but not much.

Q. Have you had any experience in that matter?

A. Yes.

Q. Please state what it is.

A. When I crossed on the 'Siberia' we had wind. It was put at about 24 miles an hour, and we had, as near as I could measure it passing along the ship's side, about 7 feet 9 inches of sea. The stern was going up and down 24 feet and 3 inches, as near as I could measure it, and it was measured very closely, and the speed, according to the day's run, was only twenty-three one hundredths of a knot reduced from the day before and the day after.

Q. How was she headed with reference to this wind and sea?

A. I don't recollect now. I have the direction but I don't recollect it.

Q. Was it a following sea?

A. No, I think it was a head sea.

Q. Have you ever had any experience on the Atlantic Ocean?

A. Yes.

Q. Please state it.

A. I measured the 'Majestic' one time. Her stem was going up and down 61 feet. She had an ordinary speed of 20 knots and she was reduced that day to 18¾ knots.

Q. Was there any wind blowing?

A. A gale wind, a heavy gale wind.

Q. That was one and ¾ knots in the whole day's run?

A. No, one knot and a quarter per hour average for the day. She was a pretty long ship—she was 560 feet.

(James Dickie, 1099-1102.)

We think counsel goes too far when he says on page 149 of his brief, "We now see *why* Lie found the two Danish fishermen", etc. It was *not* necessary to call these witnesses on any theory that Lie's calculations did not fit, if the swell was admittedly heavy, for our experts had already testified that the "Beaver's" speed would not be materially retarded by a swell without any wind. The fishermen, moreover, were called mainly to show the reckless navigation of the "Beaver" on that day and only incidentally testified as to the weather. We think that our client has been rather roughly handled on this score.

As regards our claim that the "Beaver's" speed *through* the water was fifteen knots, we still assert it. Whether such speed is affected by a current or a swell would seem to make no difference. She is making fifteen knots through the water in the one case as well as the other, while she is proceeding in the water. The only reason we can see for the proposed distinction is that in the case of *The Yarmouth,* 100 Fed. 667, 672,

cited by us, the retardation was due to a current and not a swell.

Counsel says that Captain Lie's course of S. 65° E. would take him considerably to the south of the light-ship off the Golden Gate and would be an absurd course. As the captain says, however, he simply went to his chart and drew his course, that he knew said course would not lead him into temptation before he had time to go in again, and that he just shaped the course and would have gone in and checked it up again (IV, 1167). He thought it was a course going close to the light-ship at the time and admitted his mistake in this respect at the trial. Other people also make mistakes as to courses. Captain Kidston testified before the inspectors that in a straight line his vessel would be a mile and a half off Point Reyes when passing it (III, 830), which is *very close* to the distance at which Lie thought he passed it. Kidston, however, changed this testimony to 2½ miles at the trial (III, 831).

We have perhaps already said too much, however, as to this very immaterial point. Libelant's evidence as to the point of collision was put on solely to show that the "Beaver's" speed was greater than 11 knots, the rate admitted by her. Her speed, however, was excessive in any event. And even if the point of collision is nearer to that fixed by Captain Kidston, it is a matter of no great moment. It would simply show that Captain Lie judged the bearings of Point Reyes *wrongly* and was further on his course than he thought. There is nothing remarkable about this if counsel's contentions as to the difficulty of locating sounds in a fog have

any merit, for he even cites cases where whistles are heard on the port side of a vessel and come up on the starboard side (brief, p. 38). The testimony as to the point of collision, however, in no way tends to show that the "Selja" was at a standstill. It is simply again resorting *"to an involved state of affairs and consequent uncertainties which should not be done when a collision can be fully accounted for by a manifest fault on the part of the other vessel"*.

We will close this subject by a brief reference to Captain Lie's testimony on *one* of his cross-examinations:

> "Q. Don't you think the course you were sailing on had anything to do with the collision?
> A. I don't think so.
> Q. And you don't think the distance that the vessel traveled after she left Pt. Reyes has anything to do with it?
> A. I don't think so.
> Q. And you don't think the point of collision has anything to do with the case?
> A. No, I don't think it has anything specially to do with it except that my vessel was there, that is all. I wanted to show that my vessel was there —it was for nothing else."
>
> (IV, 1188.)

V.

Evidence of the Experts (appellee's brief, pp. 155-159).

Counsel now asserts that the questions to these experts are not warranted by the evidence. He should remember, however, that they were warranted by the

evidence when they were asked. The facts in regard to the "Beaver's" speed as proved at the trial turned out to be quite different from those given out by appellee before the trial. All of the hypothetical questions are helpful, however, and can easily be adjusted to the changed conditions.

Counsel has picked out the evidence of the expert Heynemann to illustrate the questions asked. We suppose that the reason for this is that he was not quite so sure of his ground as the other two experts, but we will let that pass.

It is true that in inquiring about the "Beaver's" speed after she left the heads we did not in the first instance consider retarding sea conditions. We did not then know that there were any such retarding conditions, and the cross-examination of the experts certainly indicates that there was no great retardation. We establish the vessel's natural speed and it seems to us that it was for the claimant and not for us to show why it should be cut down.

As to the criticism of the questions based on 84 revolutions of the "Beaver's" engines, we submit that it was proper to inquire as to this as well as 77 revolutions, since 84 was the maximum number. As regards the questions containing the element of 13.572 knots instead of 15 knots at 77 revolutions, we would say that the wrong element was based on conditions as then given us by the appellee. It was clearly shown by the experts that those conditions did not fit the facts of the case. So also as to the questions based on a speed of

11 knots, the exact number given to us by the appellee before the trial.

Counsel on page 156 of his brief makes the assertion that our experts admitted that the "Beaver" would be turning to starboard "under the conditions as they actually were". We do not admit this, however. Admitting that she *would* be swinging to starboard under conditions testified to at the trial by Captain Kidston she could *not* be swinging to starboard under the conditions shown in Captain Kidston's report to the inspectors, on which report our hypothetical questions on this subject were based. Said report, as already pointed out, is also borne out by the evidence of the man at the wheel.

As regards all questions based on the ability of the "Selja" to stop in a given time, these are based on facts clearly proved to be correct. If, as counsel repeatedly claims, there was *a following sea* to help the "Selja" on and which did help her on, then it follows that it would have taken a *longer* time to stop her instead of a *shorter* time. Counsel in this part of his argument overlooks the fact that the conditions which would cut down the "Beaver's" speed would *increase* the "Selja's". In one breath counsel tells us that the following sea helped to bring the "Selja" to the point of collision as located by Captain Kidston, while in another he refers to it as *cutting down* her speed (brief, p. 157).

Counsel also says that there is no relevance to the testimony that the "Selja" going at six knots or three knots would have stopped in a certain time, in that she

did not reverse till she had been at a standstill for some minutes. This assumes the very fact in issue in this case. We again repeat that if the "Selja" was going at 6 knots until 3:05, and then reduced to 3 knots, and then stopped her engines at 3:10, it would have been impossible for her to come to a standstill without reversing before the "Beaver" was sighted (see our main brief, pp. 44-45). It is all very well, as already pointed out, to say that our evidence on this point is "based on formulae made up from the launching pool", but the fact remains that no witness was called to contradict the evidence. It may be that *at the very end* of the stopping period the vessel is almost at rest, and there is nothing so very absurd in saying that she would only move seven feet in the last minute and forty seconds. The point is that the "Selja" had not at 3:15 reached anywhere near the last minute and forty seconds, and she was clearly not at a standstill at that time. We might add that this evidence also explains the difference of opinion between Captain Lie and the experts as to when the "Selja" would be stopped, if there can be said to be any such difference.

We do not view counsel's deductions from Mr. Heynemann's evidence as to the cause of the scratches on the "Beaver's" bow (appellee's brief, p. 158), as he does. All Heynemann says is that, if the "Beaver" struck the "Selja" at right angles, *then* the scratches on her bows would have to be attributed to the "Selja's" stern movement. The evidence as to these so-called "scratches" (Cf. Stewart, I, 138), however, is potent to show that the vessels did not strike at

exactly right angles, and is strongly confirmatory of Captain Lie's testimony.

We believe that all other points made in regard to the testimony of the experts have already been covered.

We think that we have now fully answered appellee's brief, although we have not attempted to take up all of the great mass of detail therein contained. In closing, however, we wish to make one further contention as regards Article 15 and feel that it is appropriate to do so in view of the fact that the burden is upon appellee to establish a violation of this rule, and it has been accorded an opportunity to reply to us.

VI.

It Is Doubtful Whether Article 15 Applies to a Stoppage Such as That Contended for in This Case and in Any Event the Alleged Violation of Said Article Did Not Contribute to the Collision.

It is noteworthy that counsel, in his very lengthy and involved discussion of this subject, does not present a single decided case on the violation of this rule, and we do not believe that there is any such case in the books. If this be true, it is a strong argument to the effect that the rule is not applicable to a momentary stoppage such as that alleged in this case (see *Campbell v. Hackfeld,* 125 Fed. 696 at p. 697). We have examined the cases as carefully as we can, and we can find none in

which a violation of this rule is invoked. And yet, under Article 16 itself, numberless cases must have arisen where a vessel stopped her engines and came to rest for a short period. We submit that if, after all the years Article 15 has been in force, no cases can be cited thereunder, it is difficult indeed to see how the "Selja" can be held in fault for being at a standstill for a brief moment. Although we believe that we have clearly shown that the rule was not violated because never applicable, we still earnestly submit this additional argument in case the court should disagree with us.

We also earnestly submit that the "Selja's" alleged violation of the rule, even if established, did not contribute to the collision. The uncertainty as to the course Captain Kidston would have pursued had he heard two whistles is well illustrated by counsel's statement as to what he would have done, and the captain's own varying statements given before the inspectors and at the trial. Counsel says he would simply have put his wheel over to port and thus have cleared the "Selja" (appellee's brief, p. 97). Captain Kidston, before the inspectors, says, "I would have kept my course. I would probably slow down and proceed cautiously *but would not have stopped and backed*" (III, 913). On the trial he says, "I probably would have *slowed and stopped* until I located what position she was in" (id.). Counsel delights in parading inconsistencies in Lie's testimony, whereas we have not even begun to attempt to point out the inconsistencies in Kidston's evidence, of which the foregoing is a sample.

As a matter of fact Kidston had no idea where the "Selja" was, and we do not believe that anyone can read the record and come to the conclusion that he would have adopted a different course on hearing two whistles. His *duty,* on hearing either signal, would have been plain, namely: to stop and reverse and not to change his helm. It, therefore, cannot possibly be said that this fault of the "Selja" has anything at all to do with the collision. And, if our argument under Rule 16 to the effect that only *proximate* causes of the collision are to be considered be sound, it is very apparent that said fault was not such proximate cause, but at most a cause "sine qua non". We do not believe, however, that it was even the latter.

We would further again point out that, under the cases cited in our opening brief, if there is *a doubt* as to whether Rule 15 was applicable, *that doubt must be resolved in favor of the "Selja".* In view of the intricacies of the argument for the "Beaver" on this point, and the mazes through which counsel would have the court wander to establish a fault on the part of the "Selja" in this connection, in view of the inconsistencies developed in the testimony for appellee, in view of the clear and straightforward story told by the "Selja's" officers, and in view of the expert testimony —*how can it possibly be said that at least a doubt has not been raised?* Is the court to enmesh itself in a discussion as to the angle of approach of the two vessels, and the point where they collided, based on mere theory and conjecture, *when it can lay its hand upon a clear fault sufficient in itself to account for the collision?* We

submit not. We submit that the "Selja" has clearly established that it did not in fact violate Rule 15, and we further submit that, even if this is not clearly established, it is certainly *not* clearly established that she did violate it. And if only this latter premise be true, it is apparent that the "Selja" cannot be found in fault.

Dated, San Francisco,
March 24, 1914.

Respectfully submitted,

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Proctors for Appellant.